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ABSTRACT

Actions of the Federal Communications Commission (FCC) in response to a Congressional mandate to protect children from excessive programing of violence and obscentity are described and demarcated. Special attention is given to the networks' proposal for a Family Viewing Hour. The question of appropriate warnings of offensive content (viewer advisories) and program ratings is also explored, along with the question of obscene language. Appendixes include communication and policy statements from the networks. (SK)

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FEDERAL COMMUNICATIONS COMMISSION

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REPORT ON THE BROADCAST OF VIOLENT, INDECENT AND OBSCENE MATERIAL

February 19, 1975

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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In response to Congressional directives, the Federal Communications Commission submits its report of actions with respect to televised violence and obscenity. This report addresses "specific positive action taken and planned by the Commission to protect children from excessive programming of violence and obscenity." 1/

Congressional concern over the effects of television upon young people has been longstanding. The Senate Judiciary Committee's Subcommittee on Juvenile Delinquency under Senators Kefauver and later Dodd conducted investigations into this area in 1954, 1955, 1961-62 and 1964. In 1969, the National Commission on the Causes and Prevention of Violence, chaired by Dr. Milton Eisenhower, reported that:

> It is reasonable to conclude that a constant diet of violent behavior on television has an adverse effect on human character and attitudes. Violence on television encourages violent forms of behavior, and fosters moral and social values about violence in daily life which are unacceptable in a civilized society.

Subsequent to this finding, the Senate Commerce Committee's Communications Subcommittee, under Senator John O. Pastore, requested the Department of Health, Education and Welfare to initiate an inquiry into "the present scientific knowledge about the effect of entertainment television on children's behavior".

Results of that one-year study by the Surgeon General's Scientific Advisory Committee on Television and Social Behavior, 2/ added support to the view that a steady stream of violence on television may have an adverse effect upon our society -- and particularly on children. Continuing studies funded by the Department of Health, Education and Welfare during 1972-1974, as reported in the April 3-5, 1974 hearings before Senator Pastore's Subcommittee, gave further evidence of the harmful effects of televised violence on children.

1/ See H.R. Rep. No. 1239, 93d Cong., 2nd Sess. (1974), p. 15; S. Rep. No. 1056, 93d Cong., 2nd Sess. (1974), p. 17. The Commission's views of the division of responsibility with the F.T.C. with respect to advertising practices, also requested in the Congressional directives, will be submitted in a separate letter.

2/ "Television and Growing Up: The Impact of Televised Violence, A Report to the Surgeon General from the Surgeon General's Scientific Advisory Committee on Television and Violence," (1972).

Research continues in this area, but the existing evidence is sufficient to justify consideration of changes in industry practices.

The Federal Communications Commission has received substantial evidence that parents, the Congress, and others are deeply concerned. In 1972, the Commission received over 2,000 complaints about violent or sexually-oriented programs. In 1974, that volume had increased to nearly 25,000. Further, the Commission has received petitions to deny broadcast license renewals 3/ and petitions for rulemaking 4/ expressing the desire that the Commission take action with respect to televised violence, particularly as it affects children. Mindful of the public interest questions raised by the Report to the Surgeon General, subsequent research findings, and the continuing concerns of Congress and the general public, the Commission undertook a study of specific solutions to the problems of televised violence and sexually-oriented material in mid-1974.

Staff discussion and study focused upon two questions: (1) what steps might be taken to prohibit the broadcasting of obscene or indecent material and (2) what steps might be taken to protect children from other sexually-oriented or violent material which might be inappropriate for them. With respect to questions of obscene and indecent material, direct governmental action is required by statute, and the Commission intends to meet its responsibilities in this area. With respect to the broader question of what is appropriate for viewing by children, the Commission is of the view that industry self-regulation is preferable to the adoption of rigid governmental standards. We believe that this is the case for two principal reasons: (1) the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and (2) judgments concerning the suitability of particular types of programs for children are highly subjective. As a practical matter, it would be difficult to construct rules which would take into account all of the subjective considerations involved in making such judgments. We are concerned that an attempt at drafting such rules could lead to extreme results which would be unacceptable to the American public.5/

3/ George D. Corey, 37 FCC 2d 641 (1972); Oliver R. Grace, 18 P&F RR 2d 1017 (1970); see also Maguire v. Post-Newsweek, 24 P&F RR 2d 2094 (D.C. Cir. 1972).

4/ Foundation to Improve Television, 25 FCC 2d 830 (1970) (RM-1515), Petition of V.I.O.L.E.N.T., (received February 20, 1973) (RM-2140).

5/ As Chairman Richard E. Wiley stated in his February 10, 1975 speech to the National Association of Television Program Executives, at Atlanta, Georgia: "Short of an absolute ban on all forms of 'violence' -- including even slapstick comedy -- the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms. Under a rigid objective test, I suppose that it would be argued that many traditional children's films should be banned because they include some element of violence -- for example, episodes in Peter Pan when Captain Hook is eaten by a crocodile or in Snow White where the young heroine is poisoned by the witch. Such an extreme result simply does not make sense and would not be acceptable to the American people. Indeed, the lack of an acceptable objective standard is one of the best reasons why -- the Constitution aside -- I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules."

Sexual Or Violent Material Which Is Inappropriate For Children

Administrative actions regulating violent and sexual material must be reconciled with constitutional and statutory limitations on the Commission's authority to regulate program content. Although the unique characteristics of broadcasting may justify greater governmental supervision than would be constitutionally permissible in other media, it is clear that broadcasting is entitled to First Amendment protection. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC., 395 U.S. 367 (1968); United States v. Paramount Pictures, 334 U.S. 131 (1948). Congress expressed its concern that the Commission exercise restraint in the area of program regulation by enacting section 326 of the Communications Act which specifically prohibits "censorship" by this agency. 6/

On the other hand, the Communications Act requires the Commission to insure that broadcast licensees operate in a manner consistent with the "public interest." In the Red Lion decision, the Supreme Court affirmed the view that broadcasters are "public trustees" with fiduciary responsibilities to their communities. The Commission has long maintained the policy that program service in the public interest is an essential part of a licensee's obligation. Programming Policy Statement, 20 P&F R.R. 1901 (1960). We have also made it clear that broadcasters have particular responsibilities to serve the special needs of children. Children's Television Report and Policy Statement, 39 F.R. 39396 (November 6, 1974).

In light of the constraints placed on the Commission by the Constitution and section 326 of the Communications Act, the Commission "walks a tightrope between saying too much and saying too little" when applying the public interest standard to programming. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1967); Columbia Broadcasting System v. Democratic National Committee, supra. For this reason, the Commission has historically exercised caution in the area of program regulation.

Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems. In addition, any rule making in

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6/ 47 U.S.C. §326 provides that:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

these areas would require finding an appropriate balance between the need to protect children from harmful material and the adult audience's interest in diverse programming. Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium.

With these considerations in mind, Chairman Wiley initiated the first of a series of discussions with the executives of the three major television networks on November 22, 1974. 7/ In suggesting such meetings, the Chairman sought to serve as a catalyst for the achievement of meaningful self-regulatory reform. He suggested the following specific proposals for the networks to consider:

(1) New Commitment - There should be a new commitment to reduce the level and intensity of violent and sexually-oriented material.

(2) Scheduling - Programs which are considered to be inappropriate for viewing by young children should not be broadcast prior to 9 p.m. local time.

(3) Warnings - At times when such programs are broadcast, they should include audio and video warning at the outset of the program (and at the first "break"), in addition, similar to the practice in France, a small white dot might be placed in the corner of the screen during the course of a program to warn those viewers who tune in while the program is in progress that it may not be appropriate for viewing by young children.

(4) Advance Notice - Affiliates should be provided warnings in advance to be included in local TV Guide and newspaper program listings and promotional materials.

7/ Among those present representing the networks were: Arthur Taylor, President, CBS, Inc., and John Schneider, President, CBS Broadcast Group; Herbert Schlosser, President, NBC, Inc., and David Adams, Vice Chairman, NBC, Inc., Elton Rule, President ABC, Inc., and Everett Erlick, Senior Vice President and General Counsel, ABC, Inc.

In addition, the Chairman raised the possibility of adoption of a rating system similar to that used in the motion picture industry. In making these suggestions, it was understood that the decision as to which programs are so excessively violent or explicitly sexually-oriented as to be inappropriate for young children would remain in the broadcaster's sound discretion. Also, it was recognized that non-entertainment programming, such as news, public affairs, documentaries and instructional programs would be exempt from the scheduling rule.

At the time of the November 22nd meeting, no commitments were sought from the networks and none were offered. The meeting provided an opportunity for a free and candid exploration of a mutually recognized problem affecting broadcast service. Arrangements were made at that time for a continuation of discussions at the staff level and for a later meeting with top network executives. Staff members of the Commission met separately with representatives of each network in New York on December 10-11, 1974.

Not all of the proposals advanced by the Commission were found to be acceptable by the networks. However, each of the networks developed a set of guidelines which it believed should govern its programming, and policy statements incorporating these guidelines were released to the public. 8/ A common element of the three statements is that they provide that the first hour of network entertainment programming in prime time will be suitable for viewing by the entire family.

A second meeting between the Commission's Chairman and the network officials was held in Washington on January 10, 1975. At this meeting, representatives of the National Association of Broadcasters were present. 9/ During the course of this meeting, each of the networks made it clear that programs presented during this "Family Viewing" period would be appropriate for young children. Also discussed at that meeting were proposals that reforms be incorporated in the NAB Code.

8/ Copies of the network statements are attached as Appendices A, B and C.

9/ Representing the NAB at the January 10, 1975 meeting were Vincent Wasilewski, President, and Grover Cobb, Vice-President. Richard Jencks, Vice-President of CBS, Inc., was also present in addition to the network executives who attended the November 22, 1974 meeting.

On February 4, 1975, the NAB Television Code Review Board adopted a proposed amendment to the NAB Television Code similar to the guidelines adopted by the three networks but which would expand the "Family Viewing" period to include "the hour immediately preceding" the first hour of network programming in prime time. 10/ The new proposal would go into effect in September 1975, but must first be approved by the NAB Television Board, which meets in early April in Las Vegas, Nevada. The Commission has no reason to expect that the Television Board will reject the proposal of the Television Code Review Board. 11/

Taken together, the three network statements and the NAB proposed policy would establish the following guidelines for the Fall 1975 television season:

(1) Scheduling - "The first hour of network entertainment programming in prime time" and "the immediately preceding hour," is to be designated as a "Family Viewing" period. In effect, this would include the period between 7 p.m. and 9 p.m. Eastern Time during the first six days of the week. On Sunday, network programming typically begins at a different time; the guidelines would therefore provide that the "Family Viewing" period will begin and end a half-hour earlier.

(2) Warnings - "Viewer advisories" will be broadcast in audio and video form "in the occasional case when an entertainment program" broadcast during the "Family Viewing" period contains material which may be unsuitable for viewing by younger family members. In addition, "viewer advisories" will be used in later evening hours for programs which contain material that might be disturbing to significant portions of the viewing audience.

(3) Advance Notice - Broadcasters will attempt to notify publishers of television program listings as to programs which will contain "advisories." 12/ Responsible use of "advisories" in promotional material is also advised.

10/ See Appendix D.

11/ We anticipate that the same issues will be discussed with representatives of the Association of Independent Television Stations (INTV) and the educational broadcasters.

12/ Significantly, the Publisher of TV Guide (in a letter to Chairman Wiley) has pledged full cooperation with this program of warnings or advisories.

Thus, the network and NAB proposals are designed to give parents general notice that after the evening news, and for the duration of the designated period, the broadcaster will make every effort to assure that programming presented (including series and movies) will be appropriate for the entire family. After that time, parents themselves will have to exercise greater caution to be confident that particular programs are suitable for their children. Warnings would continue to be broadcast in later hours to notify viewers of those programs that might be disturbing to significant portions of the audiences.

The Commission believes that the recent actions taken by the three networks and the National Association of Broadcasters Television Code Review Board are commendable and go a long way toward establishing appropriate protections for children from violent and sexually-oriented material. This new commitment suggests that the broadcast industry is prepared to regulate itself in a fashion that will obviate any need for governmental regulation in this sensitive area.

It is inevitable that there will be some disagreements over particular programs and the question of their suitability for children. Interpretation of which programs are appropriate for family viewing remains, as it should, the responsibility of the broadcaster. The success of this program will depend upon whether that responsibility is exercised both with good faith and common sense judgment . Thus, meaningful evaluation by Congress and the public of the efficacy of these self-regulatory measures must await observation of how they are interpreted and applied by the broadcasters.

The industry proposal represents an effort to strike a balance between two conflicting objectives. On the one hand, it is imperative that licensees act to assist parents in protecting their children from objectionable programming. On the other hand, broadcasters believe that if the medium is to achieve its full maturity, it must continue to present sensitive and controversial themes which are appropriate, and of interest, to adult audiences.

Parents, in our view, have -- and should retain -- the primary responsibility for their children's well-being. This traditional and revered principle, like other examples which could be cited has been adversely affected by the corrosive processes of technological and social change in twentieth-century American life. Nevertheless, we believe that it deserves continuing affirmation.

Television, as a guest in the American home, also has some responsibilities in this area. In providing a forum for the discussion of excessive violence and sexual material on television, the Commission has sought to remind broadcasters of their responsibility to provide some measure of support to concerned parents.

It is obvious that the reforms proposed by the industry will not provide absolute assurance that children or particularly sensitive adults will be insulated from objectionable material. However, no reform short of a wholesale proscription of all violent and sexually-oriented material would have that effect. Surveys have indicated that some children will be viewing television during all hours of the broadcast day, and not just during the hours now designated for "Family Viewing". Some, who are not properly supervised, may be exposed to programming which a responsible adult would consider inappropriate for them. We believe, however, that the industry plan provides a reasonable accommodation of parental and industry responsibilities.

It should be stressed that the networks do not view the post 9 p.m. viewing period as a time to be filled with blood, gore and explicit sexual depictions. The presidents of all three networks have assured the Commission that there will continue to be restraint in the selection and presentation of program material later in the evening.

We recognize that there will be some disagreements with specific aspects of these industry self-regulatory measures. As we have already indicated, the "Family Viewing" period will be presented at different hours in different time zones. This special period would ordinarily end at 9:00 p.m. in New York and Los Angeles, at 8:00 p.m. in the Midwest, and as early as 7:00 p.m. in portions of the Mountain Time Zone. 13/ In addition, the fact that the "Family Viewing" period may be presented at a different time on Sunday may create some confusion. 14/

The success of the entire "Family Viewing" principle depends upon the good-faith and responsibility of the networks and other broadcasters. It is important that the "program advisories" and advance notices not be used in a titillating fashion so as to commercially exploit the presentation of violent or sexually-oriented material. Also, the new guidelines will not gain the acceptance of the American people if broadcasters prove to be unreasonably expansive in deciding which programs are appropriate for family viewing.

13/ In this regard, the networks have informed us that a standard based on 9:00 p.m. local time would require prohibitively expensive separate program transmissions to each time zone.

14/ We are encouraged, however, that one network has recently advised us that its "Family Viewing" period will continue until 9:00 p.m. Eastern Time seven nights a week beginning with September 1975.

Despite these considerations, we believe the new guidelines represent a major accomplishment for industry self-regulation, and we are optimistic that these principles will be applied in a responsible manner which will be acceptable to the American people.

Broadcast of Obscene or Indecent Material

Congress has authorized the Commission to enforce Title 18, United States Code, Section 1464 which prohibits utterance of "any obscene, indecent or profane language by means of radio communication." The Commission is further authorized to utilize its administrative remedies against broadcast licensees who violate Section 1464. 15/ The Commission has utilized these administrative remedies on a number of occasions. 16/ It has exercised its powers carefully, however, with due regard to the sensitive constitutional issues involved.

The Commission believes that Title 18, Section 1464 may be inadequate for the purpose of prohibiting explicit visual depictions of sexual material. The precise terms of the statute refer to "utter[ance] of ... language." It is, therefore, uncertain whether the Commission has statutory authority to proceed against the video depiction of obscene or indecent material. 17/ For this reason, we will include in our legislative proposals for action by this Congress an amendment to Section 1464 which would eliminate this uncertainty. In addition, our proposal would extend the prohibition to cable television.

15/ The Commission may (1) revoke a station license, (2) issue a cease and desist order, or (3) impose a monetary forfeiture for violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). It may also (4) deny license renewal or (5) grant a short term license renewal, 47 U.S.C. 307, 308.

16/ See e.g., Palmetto Broadcasting Co., 33 FCC 250, 23 P & F R.R. 483, (pattern of abuse; indecent language; license revoked), aff'd on other grounds sub nom Robinson v. FCC, 334 F. 2d 534 (D.C. Cir. 1962), cert. denied, 379 U.S. 843 (1964); Jack Straw Memorial Foundation, 21 FCC 2d 833 (1970) (indecent language; short term renewal); Pacifica Foundation, 36 FCC 147, 1 P&F R.R. 2d 747 (1964) (no overall pattern of abuse), 2 FCC 2d 1066, 6 P&F R.R. 2d 570 (1965) (short term renewal); Eastern Educational Radio (WUHY-FM), 24 FCC 2d 408 (1970) (indecent language; forfeiture imposed); Sonderling Broadcasting Co, FCC 2d, 27 P&F R.R. 2d 1508 (1973) ("sex talk shows," forfeiture imposed), aff'd sub nom Illinois Citizens Committee for Broadcasting v. FCC, No. 73-1652, ___ F. 2d ___ (D.C. Cir., Nov. 20, 1974), petition for rehearing en banc pending.

17/ See the Commission's comments on S. 1, 94th Cong., 1st Sess. (1975), in Letter to Hon. John L. McClellan and Hon. Roman H. Hruska and Letter to Mr. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, adopted November 27, 1974. No court has authoritatively construed 18 U.S.C. 1464 with respect to visual depictions.

In 1970, the Commission focused specifically on the problem of "indecent language". In Eastern Educational Radio (WUHY-FM), supra, the Commission issued a notice of apparent liability which held "indecent" the use of the certain words during a pre-recorded broadcast interview. In 1973, the Commission issued another notice of apparent liability in Sonderling Broadcasting Co., 27 R.R. 2d 285, recon. denied, 41 FCC 2d 777 (1973) for broadcasting explicit discussions of ultimate sexual acts, holding that the material broadcast was both "obscene and indecent" under Section 1464 and the prevailing constitutional obscenity test. 18/ Our decision in Sonderling Broadcasting Co., supra, was recently affirmed by the Court of Appeals for the District of Columbia Circuit in Illinois Citizens Committee for Broadcasting v. FCC, supra. In an opinion written by Judge Leventhal, the Court issued the first judicial decision supporting the FCC's conclusion that the probably presence of children in the radio audience is relevant to a determination of obscenity.

However, it is apparent to the Commission that particularly on radio the problem of "indecent" language has not abated and that the standards set forth in prior opinions has failed to resolve the problem. Thus, we adopted on February 12, 1975, a declaratory order clarifying the Commission's position on the broadcasting of indecent language in violation of 18 U.S.C. 1464. In re Citizen's Complaint Against Pacifica Foundation (WBAI-FM), File No. BRH-13, a copy of which is included herein as Appendix E. The previous definition of "indecent" language in WUHY, supra, 19/ is clarified by eliminating the test "utterly without redeeming social value" which the Supreme Court modified in Miller v. California, 413 U.S. 15 (1973). The new definition of "indecent" is tied to the use of language that describes, in terms patently offensive as measured by contemporary community standards for broadcast media, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. 20/

We are hopeful that the combined effects of the declaratory order and the proposed amendment to 18 U.S.C. 1464 will clarify the broadcast standards for obscene and indecent speech as well as visual depictions and will prove effective in abating the problems which have arisen in these areas.

18/ John Cleland's "Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 412 (1968).

19/ The Commission had defined "indecent" as material that is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value, 24 FCC 2d at 412.

20/ When the number of children in the audience is reduced to a minimum, for example, during the late evening hours, the Commission would then consider whether the material has "serious literary, artistic, political or scientific value." However, that standard would not be used when there is a substantial number of children in the audience.

* * *

APPENDIX A

LETTER FROM MR. ARTHUR R. TAYLOR, PRESIDENT, CBS, INC., TO MR. WAYNE KEARL, CHAIRMAN, NAB TELEVISION CODE REVIEW BOARD, DECEMBER 31, 1974.

Mr. Wayne Kearl, Chairman
NAB Television Code Review Board
Avenue E and Fourth Street
San Antonio, Texas 78205

Dear Wayne:

The purpose of this letter is to recommend to the NAB Television Code Review Board certain changes in the existing Code, and to set out our reasons for believing that these changes are important to the public interest. Our recommendations result from continuing review of the principles which govern CBS television programming content and scheduling. They were developed after consultation with many of our affiliates, although we make no representation that our affiliates endorse these principles, in whole or in part.

In consideration of any Code matter, there is always one critical test that must be applied: whether a proposed provision could have a stifling effect on the creative processes of the medium. If the answer is affirmative, or even in doubt, then the provision, in CBS's view, is contrary to the public interest. It is CBS's strong and abiding conviction that the public interest can be served only when the creative potential of broadcasting is nurtured and encouraged, and when it is allowed to function as free from inhibiting restrictions as are, traditionally and constitutionally, all other media. The essential fact about broadcasting in this country is that, due to the freedom in which it has so far been able to flourish, the American people--of all ages--are far better informed and more knowledgeable about the world around them than any other people in the history of mankind. This freedom must never be compromised--and must in fact be constantly reaffirmed.

Because of varying tastes, interests, opinions and ages, no program "code" could ever, in its entirety, satisfy even a large percentage of American television viewers. The best and most respected literary works in the world, for instance, contain incidents which some segments of our society would consider inappropriate for portrayal on television. We are wholly convinced that, if the intellectual and cultural quality of our nation is to advance, broadcasters must remain free to exercise their best judgment on the way in which they serve the tastes of their various audience groups. They must also avoid permitting the tastes of one age or interest group to completely dominate those of others. Insofar as children are concerned, we must not lose sight of the fact that there simply is no substitute--nor should there be--for discriminating parental supervision of television viewing within each family's home and according to each family's judgment as to what is appropriate material for its younger members.

All this is not to deny but to confirm strongly that we assume full responsibility for the quality of CBS programs which go into the home, particularly for family viewing. And we most certainly recognize the need for arriving at self-imposed standards in that connection. For this reason, CBS has long been a subscriber and adherent to the NAB Television Code. Sections I, II and IV of the Code provide guidelines governing program content, responsibility toward children and special standards. We believe these provisions ought to be improved--and that they can be--without sacrificing any of the precepts we hold absolutely essential to the steady enlargement of the capacity of television to serve all the people.

First, CBS believes the programming in the first hour of the network prime-time schedule should be suitable for family viewing. Increasingly conscious of its responsibility to younger viewers, CBS has made substantive changes in recent years in early evening programming, as well as in programming designed specifically for viewing by children, such as that which appears on Saturday morning. This is part of our continuing process of review.

Second, on the rare occasions when a CBS "special" within the first hour of primetime programming represents an exception to the appropriate-for-family-viewing criterion, a notice making this fact clear will be broadcast to facilitate parental guidance, and publishers of television program schedules will be notified in advance of air date.

Third, in other viewing hours, CBS will continue its policy of providing prior notice, including on-air announcements, when material which might be disturbing to a significant portion of the adult audience is being presented.

Recommendation. CBS recommends that the NAB Television Code Review Board expand the present Code to embody the three general principles reflected in the above. To this end, the CBS representative on the Board, Tom Swafford, is prepared to discuss these proposals and to answer questions about them at any time. So am I, and so are John A. Schneider, President of the CBS/Broadcast Group and Robert D. Wood, President of the CBS Television Network.

With all good wishes.

Sincerely,
Arthur R. Taylor

APPENDIX B

RELEASE AND STATEMENT OF PROGRAM STANDARDS, NATIONAL BROADCASTING CO., JANUARY 6, 1975.

The National Broadcasting Company today announced that it plans to devote the first hour of its prime time network schedule to programming suitable for general family viewing. This follows and builds upon the network's current practice of opening its prime time schedule, on each evening of the week, with a series suitable for family viewing.

The extension of NBC's policy, to be applied in developing the coming season's programming starting September 1975, is set forth in a detailed statement of program standards, a copy of which is attached. This restates and supplements the provisions of NBC's long-standing Code of Broadcast Standards to reflect practices now followed and to be followed.

The program standards statement deals with treatment of adult themes in programming, scheduling of such programs, and the application of a broad system of advance audience warnings already in effect, to enable parents to decide on whether their children or other members of the family should view programs designed for adults. It also deals with questions of responsibility and how the program standards are applied.

In addition to its own Code of Broadcast Standards, NBC adheres to the Code of the National Association of Broadcasters. It intends to follow the policies described above, whether or not the NAB Code is amended to include similar principles, as recently suggested.

STATEMENT OF PROGRAM STANDARDS

NBC exercises a systematic and continuing effort, through two separate departments -- the Broadcast Standards Department and the Program Department -- both guided by management policy, to assure that its programming meets the public's general standards of acceptability for the television medium. NBC recognizes that this home medium requires stricter standards than other media.

Given the nature of television, which reaches viewers of all levels of taste and interest, NBC regards the application of proper standards as a substantial responsibility it has a duty to meet.

NBC has operated under its own Code of Broadcast Standards for almost 30 years and has revised that Code as new developments have required. It also adheres to the Television and Radio Codes of the National Association of Broadcasters. The standards set forth in the NBC and NAB Codes are necessarily statements of general principles which must be applied to specific program material. This application requires sensitive case-by-case judgments that strike a proper balance between meeting the public interest in responsible and creative entertainment, including programs dealing with social concerns or

employing realistic treatments, while adhering to standards of taste and propriety appropriate to television.

The following restates and supplements the provisions of the NBC Code of Broadcast Standards to incorporate practices now followed and to be followed in connection with the treatment and scheduling of network entertainment programs containing elements of sex or violence.

1. Responsibility. NBC accepts an important responsibility for seeking to ensure that where its entertainment programs contain depictions of violence or present sexual themes, such program elements do not violate standards generally acceptable to the public. It maintains a substantial staff which exercises care in following procedures for the review of program material, through all stages of production, so that this responsibility is properly fulfilled.

2. Sex. Explicit, graphic or undue presentations of sexual matters and activities will be avoided. Sexual themes should not be gratuitously injected into story lines. When they are involved as a natural part of plot or characterization, they will be treated with intelligent regard for commonly accepted standards of taste and perception, and not in a manner that would be offensive to general audiences.

3. Violence. Violence will be shown only to the extent appropriate to the legitimate development of theme, plot, or characterization. It should not be shown in a context which favors it as a desirable method of solving human problems, for its own sake, for shock effect, or to excess.

4. Scheduling. In exercising its responsibility for programming and the proper application of broadcast standards, NBC will take into account the suitability of the program for the time period for which it is scheduled. This includes many considerations, such as subject matter, composition of audience, manner of treatment, whether the portrayal deals with themes of fiction, fantasy or contemporary reality, whether it presents pro-social or anti-social behavior and similar matters calling for a case-by-case judgment. NBC's policy is reflected by its present schedule (1974-75) in which the television network's prime time programming opens, each evening of the week, with a series suitable for general family viewing. NBC expects to continue and expand this policy, effective September 1975, so that the first hour of its prime time network schedule will be devoted to programming of this type. If any program in the opening hour might be fairly considered as unsuitable for children, NBC will apply the system of warnings described in the following section.

5. Warnings. Programs suitable for general audiences may in certain cases contain material regarded by some parents as unsuitable for their children or other members of their family. NBC will make case-by-case judgments on whether the circumstances -- including the subject, treatment and time period -- warrant special precautions. When NBC judges that such precautions are necessary, it will pre-screen the program for affiliated stations and follow a system of audience warnings. These audience warnings will include adviso-

ries in audio and video form at the beginning of the program and also at a later point in the program and warnings in advance of the program where possible, in appropriate promotional material. This system is designed to alert viewers to the situation in advance, so that they can determine whether they care to view the program or permit children or other members of the family to do so. NBC has recently expanded its procedures in publicizing advance warnings along the foregoing lines, and will apply this expanded procedure when appropriate.

6. Application. The foregoing standards are not self-executing and will be applied conscientiously by an experienced staff in the Program Department and the Broadcast Standards Department. They represent the principles and procedures learned from experience and they will be modified, supplemented and expanded, as necessary, in the light of future experience.

APPENDIX C

RELEASE AND POLICY STATEMENT ON BROADCASTS WHICH PORTRAY VIOLENCE AND ADULT THEMES, AMERICAN BROADCASTING CO., JANUARY 8, 1975.

The American Broadcasting Company announced today that the first hour of each night of its prime time network entertainment schedule will be devoted to programming suitable for general family audiences starting with the new television season in the Fall of 1975.

When, in ABC's judgment, programming in this time period may, on occasion, contain material which might be regarded as unsuitable for younger family members, viewers will be advised both visually and aurally at the start of such programs.

In a statement on its policies on broadcasts which portray violence and adult themes, ABC emphasized a continuing awareness of its obligation to select with sensitivity its programs, cognizant of the possible effect that violence and adult themes may have on the audience, particularly younger viewers.

In order to better inform viewers, ABC has been televising audio and video advisory announcements, when appropriate, in certain entertainment programs to afford parents the opportunity of exercising discretion with regard to younger viewers.

As part of a continuing review of these policies, ABC recently increased the use of advisory announcements and will now also include them in on-air promotion and print advertising.

A statement of ABC's policies on broadcasts which portray violence and adult themes is attached.

The American Broadcasting Company issued the following statement in response to recent inquiries about its policies on broadcasts which portray violence and adult themes:

The American Broadcasting Company acknowledges and accepts the continuing responsibility to its viewers for all programs broadcast by the ABC Television Network. We are, and have been, aware of our obligation to select, with sensitivity, programs, cognizant of the possible effect that violence and certain adult themes may have on that audience, particularly younger viewers.

Aware of current public opinion concerns and in order to better inform the viewing audience, ABC has been televising audio and video advisory announcements, when appropriate, in certain entertainment programs to afford parents the opportunity to exercise discretion in regard to younger viewers.

As part of a continuing review of these policies, we have recently increased the use of such audio-visual viewer advisories, and will also now be including them in print advertising and on-air promotional material.

As an additional measure, starting with the new television season in the Fall of 1975, the first hour of each night of the week of our prime time network entertainment schedule will be devoted to programming suitable for general family audiences. When in our judgment, programming in this period may, on occasion, contain material which might be regarded as unsuitable for younger members of the family, the audience will be appropriately advised as outlined above.

We wish to emphasize the necessity to preserve the basic rights of freedom of expression under the Constitution and under the Communications Act. Government action in the area of program content must be both cautious and carefully limited lest we do permanent damage to the principles of free expression which are so fundamental in our society. All Americans recognize, we are sure, that these are sensitive and fragile concepts. Accordingly, ABC strongly supports the concept of industry self-regulation.

The providing of network television programming is an extremely complicated task which we attempt to do in a responsible fashion. We serve a diverse audience, among whom are people with wide differences of opinion about our programs. For instance, there are those who look upon the treatment of certain subjects in dramatic programs as too controversial to be touched upon. There are also those who feel that these same subjects reflect changes in our society which television should realistically portray; and if not, has failed its responsibility. It is for these reasons that we attempt to present each season a balanced program schedule with diverse content and program types which will appeal to broad segments of the public.

VIOLENCE

Since June of 1968 the following has been the policy of American Broadcasting Company with respect to portrayal of violence in television programs:

> "The use of violence for the sake of violence is prohibited. In this connection, special attention should be given to encourage the de-emphasis of acts of violence.
>
> While a story-line or plot development may call for the use of force -- the amount, manner of portrayal and necessity for same should be commensurate with a standard of reasonableness and with due regard for the principle that violence, or the use of force, as an appropriate means to an end, is not be emulated."

Additionally, special attention has been directed to avoid close-ups of demonstrations of criminal techniques. The foregoing has been brought to the attention of producers of ABC entertainment programs on a regular basis.

It has also been ABC's policy, since April 1972, to prohibit acts of personal violence from being portrayed in teasers, prologues and promotional announcements.

In connection with the application of this policy and because of our special concerns over the possible effects of televised violence on young people, ABC took the initiative to sponsor on-going research in this area and has retained two teams of entirely independent research consultants. An important adjunct to this research is the refinement and continued development of guidelines by which we can effectuate our policies. We have found, for example, that violence can be responsibly portrayed to the extent to which its consequences are adequately depicted in depth. Under these circumstances, such portrayals may even have the effect of reinforcing real-life prohibitions, thereby acting as a suppressor of violence. On the other hand, as it is clear that gratuitous violence serves no useful purpose and may be emulated, we are extremely cautious in avoiding the portrayal of specific, detailed techniques involved in the use of weapons, the commission of crimes or avoidance of detection.

ADULT SUBJECT MATTER

In meeting the challenge to present innovative programming which deals with significant moral or social issues and with current topical program treatments of inter-personal relationships, it has been a guiding principle that the presentation of such material be accomplished unexploitatively, unsensationally and responsibly. In relation to made-for-television programs it is the responsibility of the Standards and Practices Department to review material which includes sensitive or controversial matter from the script stage through the final print so as to avoid the exploitative and sensational feature films initially produced by others for theatrical release are screened prior to acquisition by ABC to determine, in the first instance, the acceptability of the overall theme and tenor of the films and, if appropriate, in the second instance, the nature and extent of editing which we will require to assure compliance with our policies. After acquisition the films are screened again to review prior judgments, and as an additional measure, the edited version is viewed prior to telecast to insure compliance with broadcast standards and practices directives. In the event a film which is proposed to televise was originally rated "R", we require that it be resubmitted to the Motion Picture Association of America for classification in terms of their judgment and on the basis of our rating. If the MPAA feels that the edits would have made the picture presentable theatrically with a higher rating than "R", e.g., "PG" or "G", we will then accept it for telecast.

As a matter of practice ABC follows the following procedures:

1. Advisory announcements, when made, are commonly telecast in the following form:

> "This film deals with mature subject matter. Parental judgment and discretion are advised."

2. All affiliates are furnished Advance Program Advisory bulletins detailing content.

3. Closed circuit previews of prime time programs are presented on a regularly scheduled rotational basis.

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4. Advance descriptive program information is made available to the NAB Code Authority and the NAB Code Authority Director is accorded an opportunity to request screenings prior to broadcast. All pilot programs are prescreened for the NAB Code Authority Director.

5. Our independent outside consultants (Dr. Melvin Heller and Dr. Samuel Polsky) review all pilots and other programming from time to time as requested by the Standards and Practices Department.

The foregoing policies will be implemented by our Department of Broadcast Standards and Practices in consultation with ABC's independent professional consultants.

APPENDIX D

AMENDMENT TO THE NAB CODE ADOPTED BY THE NAB TELEVISION CODE BOARD, FEBRUARY 4, 1975.

Additionally, entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceeding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later prime time periods contain material that might be disturbing to significant segments of the audience.

These advisories should be presented in audio and video form at the beginning of the program and when deemed appropriate at a later point in the program. Advisories should also be used responsibly in promotion material in advance of the program. When using an advisory, the broadcaster should attempt to notify publishers of television program listings.

APPENDIX E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 75-200
30291

In the Matter of a	)	
	)	
CITIZEN'S COMPLAINT AGAINST	)	File No. BRH-13
PACIFICA FOUNDATION	)	
STATION WBAI (FM)	)	
New York, New York	)	
	)	
Declaratory Order	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 1975 ; Released

By the Commission: Chairman Wiley concurring in the result; Commissioners Reid and Quello concurring and issuing statements; Commissioner Robinson concurring and issuing a statement in which Commissioner Hooks joins.

1. During the past several years, the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves. In 1970, the Commission focused on this problem in Eastern Educational Radio (WUHY-FM), 24 FCC 2d 408 (1970) and issued a notice of apparent liability which held "indecent" the use of the words "fuck" and "shit" during a pre-recorded broadcast interview.1/

2. Since that decision, the problem has not abated and the standards set forth apparently have failed to resolve the issue. Moreover, the Supreme Court in Miller v. California, 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency in WUHY. Further, Sonderling Corp., 27 RR 2d 285, recon. denied 41 FCC 2d 777 (1973) was affirmed sub. nom. Illinois Citizens Committee for Broadcasting, et al. v. FCC, D.C. Cir. No. 73-1652, decided November 20, 1974, and is the first judicial decision upholding the FCC's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.2/

1/ The Commission is empowered to impose sanctions on licensees who violate § 1464 of Title 18 of the United States Code which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C.A. 1464.

2/ The Court upheld the Commission's finding of obscenity against a radio call-in show which, during hours when the audience could include children, had broadcast explicit discussions of ultimate sexual acts in a titillating context. Accordingly, it did not have to "reach the question of the constitutionality of [the Commission's] interpretation and application of the term 'indecent.'" Slip Op. 10, n. 5. The Commission had defined "indecent" as material that is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. 24 FCC 2d at 412.

In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of "indecent" language. This order does not deal with the somewhat different problem of "obscene" language which was discussed by the Commission in Sonderling Corp., supra.

The Complaint

3. First, we consider the facts which give rise to this review. On December 3, 1973, the Commission received a complaint from a man in New York City stating that in the early afternoon of October 30, 1973, while driving in his car, he heard broadcast by Station WBAI (licensed to the Pacifica Foundation) the words "cocksucker," "fuck," "cunt," and "shit." He stated that "This was supposed to be part of a comedy monologue," that "Any child could have been turning the dial, and tuned in to that garbage," and that "Incidentally, my young son was with me when I heard the above . . ."

4. The cover of the record, which the licensee subsequently identified as having been played in part at approximately 2 p.m. on October 30, 1973,states that it was recorded live at the Circle Star Theatre, San Carlos, California. The segment of the record to which the complainant obviously referred was Cut 5 of Side 2, titled "Filthy Words" and ran 11 minutes and 45 seconds. A verbatim transcript of this material is attached hereto as an Appendix and is incorporated herein by reference.

5. Review of this recorded monologue reveals that it consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say . . ." Thereafter there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.

Pacifica's Response

6. On December 10, 1973, the complaint was forwarded to WBAI(FM) with a request for its comments. After receipt of the licensee's initial response, dated January 7, 1974, the Commission, on March 26, 1974, requested that it forward a recording or complete script of the program in question. In response, the licensee stated that the complaint was based on the language used "in a satirical monologue broadcast during

the course of a regularly scheduled live program,'Lunchpail,' hosted by Paul Gorman, on October 30, 1973, at approximately 2:00 p.m." The licensee stated that "the monologue in question was from the album 'George Carlin, Occupation: FOOLE, Little David Records"; that on October 30 the "Lunchpail" program "consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language," that the subject was also discussed with listeners who called in and that "Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society." The licensee continued as follows:

> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, [complainant] is the only person who has complained about either the program or the George Carlin monologue.
>
> George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language - particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.
>
> His stories of childhood life on New York's city streets, parochial school, have a common purpose - to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.
>
> As with other great satirists - from Jonathan Swift to Mort Sahl - George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding on the subject.

In response to the Commission's request for a recording or script of the program, the licensee, by letter dated April 3, 1974, stated that no recording of the program was made, "and since the program was done live and extemporaneously, no script was prepared in advance."

Discussion

7. At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." But the prohibition against the broadcast of "obscene, indecent, or profane language" was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. 1464. Congress has clearly indicated that both the Department of Justice and the FCC are obliged to enforce section 1464. 3/ This declaratory order is not intended to modify our previous decisions recognizing broadcasters' broad discretion in the programming area. For example, in Pacifica Foundation, 36 FCC 147 (1964), licenses were renewed where provocative programming had offended some listeners. Pacifica had, however, taken "into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum)." 36 FCC at 149. See also Anti-Defamation League, 4 FCC 2d 190, affirmed 131 U.S. App. D.C. 146, 403 F.2d 169 cert. denied 394 U.S. 930 (1969).

8. Congress, the Commission, and the Courts have recognized that the broadcast medium has special qualities which distinguish it from other modes of communication and expression. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). As we noted in WUHY-FM, supra:

> . . . broadcasting is disseminated to the public (Section 3(o) of the Communications Act, 47 U.S.C. 153(o)) under circumstances where reception requires no activity of this [purchasing] nature. Thus it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very

3/ Thus Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. 307, 308.

> nature thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. 24 FCC 2d at 411. (Footnotes omitted).

The intrusive nature of broadcasting was also recognized in Sonderling Broadcasting:

> [Broadcasting] is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show and decide to turn the dial to try something else. While many have loyalty to a particular station or stations, many others engage in this electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater. 27 RR 2d at 288.

See also, Illinois Citizens, supra, Slip. Op. 11, 15.

9. In view of these unique qualities, we believe that the broadcast medium is not subject to the same analysis that might be appropriate for other, less intrusive forms of expression. As the Supreme Court pointed out in Burstyn v. Wilson, 343 U.S. 495, 502-503 (1952), "each method [of expression] tends to present its own peculiar problems." And "the mode of dissemination" can be a relevant consideration, particularly when there is "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." Miller v. California, 413 U.S. at 18-19. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children. 4/

4/ "Possible negative effects on children are concerns unto themselves . . . So long as broadcasting is so all pervasive and can get into those homes where parental guidance is non-existent, it should take advantage of its opportunities. It should not shift its responsibilities . . . ." Quaal & Martin, Broadcast Management 57-60 (1968).

10. There is authority for the proposition that the term "indecent" in Section 1464 is not subsumed by the concept of obscenity --that the two terms refer to two different things. See United States v. Smith, 467 F.2d 1126 (7th Cir. 1972); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966). But the term "indecent" has never been authoritatively construed by the Courts in connection with Section 1464. The Commission did offer a definition in WUHY-FM, supra, but relied substantially on the then existing definition of obscenity. In view of subsequent decisions (Miller and Illinois Citizens, supra), we are reformulating the concept of "indecent."

11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance. Williams v. District of Columbia, 136 U.S. App. D.C. 56, 419 F.2d 638 (en banc 1969); Von Sleichter v. United States, 153 U.S. App. D.C. 169, 472 F.2d 1244 (1972). Nuisance law generally speaks to channeling behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See Wisconsin v. Yoder, 406 U.S. 206, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offense as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. 5/ Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have

5/ Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and carefully schedules for late night broadcasts those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (emphasis added) 36 FCC at 149, n. 3. See also WUHY-FM, 24 FCC 2d at 411.

no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, WUHY-FM, 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value. 6/

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. Miller v. California, supra.

13. We recognize that Cohen v. California, 403 U.S. 16 (1971) held that an individual could not be punished for walking through a courthouse corridor wearing a jacket on which was written: "Fuck the draft." Significantly, Mr. Justice Harlan also observed in Cohen that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue." A decent respect for the right of those who want to be "free from unwanted expression in the confines of one's home" (403 U.S. at 22) dictates that if a licensee decides to broadcast under the circumstances specified in paragraph 12, above, he must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home. Cf. Rowan v. Post Office Dept., 397 U.S. 728, 738 (1970).

6/ There is ample authority for the proposition that material may be forbidden distribution among children, because it would be obscene as to them, even though the same material would not be obscene as to adults, and, accordingly, could not be forbidden to circulate among them. See Ginsberg v. New York, 390 U.S. 629 (1968). The "indecency" definition proposed herein adapts this idea of "variable obscenity" to the realities of both radio transmission and constitutional law.

CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy,which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in WUHY-FM and Sonderling. A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 USC 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words"

considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. Programming Policy Statement, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); Stone v. FCC, 151 U.S. App. D.C. 145, 466 F.2d 316 (1972); Yale Broadcasting Co. v. FCC, 155 U.S. App. D.C. 390, 478 F.2d 594, cert. denied, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAI, New York, New York, IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION *

Vincent J. Mullins
Secretary

*See attached statements of Commissioners Reid, Quello and Robinson.

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu.
I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay. I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really -- it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word -- the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty - dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock - three times. It's in the Bible, cock is in the Bible. (laughter) And the first time you heard about a cock-fight, remember - What? Huh? Naw. It ain't that, are you stupid? man, (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)
Read it! (from audience)
Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's

okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't cut that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that. (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, the shit is going to hit de fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals -- Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in a Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh. (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, today. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect, It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a kuh. Right? (laughter) A little something for everyone. Fuck. (laughter) Good word. Kind of a proud word, too. Who are you? I am FUCK. (laughter) FUCK OF THE MOUNTAIN. (laughter) Tune in again next week to FUCK OF THE MOUNTAIN. (laughter) It's an interesting word too, cause it's got a double kind of a life - personality - dual, you know, whatever the the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love, (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you

save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you, (laughter) man. It would be . .ce to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list, I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your ass. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight, and thank you also. (clapping, whistling)"

CONCURRING STATEMENT

OF

COMMISSIONER CHARLOTTE T. REID

Today, the Commission takes what I feel to be an important and altogether necessary step in clarifying our position on the broadcasting of indecent language over the public's air waves. I therefore concur with the action of the Commission.

This practice, though engaged in by only a few careless broadcasters, has been a constant source of irritation over the past several years. Now, the formulation of the standards set forth in our Declaratory Order should serve as a signal to those few offending broadcasters that the Commission is fully cognizant of our public interest responsibilities in this sensitive area. I, for one, will not hesitate to enforce what I perceive to be the clear mandate of the public interest should this abhorrent practice continue.

While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p. m. or 2:00 a. m.

CONCURRING STATEMENT OF COMMISSIONER QUELLO

While I concur in the adoption of the document clarifying the Commission's position on the broadcasting of indecent language, I have serious reservations as to the extent of the standard enunciated. I concur in the action only because I recognize the need for an up-dated standard in light of the Supreme Court's ruling in Miller v. California, 413 U.S. 15 (1973).

I agree wholeheartedly with the conclusion that the words listed in Paragraph 14 "...are words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

I would emphasize that I am not here espousing a prudish critique of the use of words of this nature. I do criticize the broadcast of such words so that they may intrude into the privacy of the home via the unsuspecting listener's radio set.

I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political, or scientific value. They will note that the audience is composed of a minimum of children, and their pre-program caveats will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

I must reiterate that I have concurred in the adoption of the new standard on broadcasting of indecent language only for the reason that there must be a line drawn somewhere as to what this Commission will permit to be broadcast. Recognizing the pitfalls inherent in the approach we have taken, I concur in the decision -- with trepidation.

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON
IN WHICH COMMISSIONER BENJAMIN L. HOOKS JOINS

On reading George Carlin's monologue, my first instinct was to affirm his opinion that these were indeed words "you couldn't say on the public. . .airwaves." Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of non-interference by government in matters of public decency and decorum commands us to reject Carlin's opinion and accept that of Pacifica. On still further reflection, I am led to conclude, along with my colleagues, that even a rigorous respect for the principles of free speech and government non-intervention permits some accommodation to the demands of decency. I think it must be emphasized, however, just how limited is the scope of that accommodation. Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid "indecent" language over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of governmental restraint in matters of public decorum. Today's decision accordingly gives a narrow meaning to the term "indecent," tying the definition essentially to that which is deemed inappropriate for children without parental supervision. I concur in that determination (subject to some reservations) for reasons which call for elaboration.

I. Constitutional Background

The majority's opinion ably examines most of the pertinent constitutional precedent, but it does not offer all of the background which I think is helpful in placing this decision in the larger context of constitutional jurisprudence. For the moment we may fudge the distinction, if any, between the "obscene" and the "indecent." There is no

significant jurisprudence explaining the meaning of the latter term. However, the difficulties that have arisen in connection with obscenity regulation fairly display the problems one runs into where laws seek to control matters that go to the injury of intangibles, like people's sensibilities, rather than palpable damage.*/

For obscenity regulation, modern times begin with Roth v. United States, 354 U.S. 467 (1957), which held that whether a work was obscene must turn on "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to a prurient interest." In Roth, the Court declined the opportunity to hold that certain kinds of speech relative to the anal or genital taboos were "special" in some sense, and subject to reasonable regulation. Instead, it held that obscene speech was not constitutionally protected at all, and could accordingly be suppressed. This false dichotomy burdens the law of obscenity to this day. By insisting that sexually frank speech belonged to one domain and protected speech to another, the Court made it necessary to decide in case after case the hard question, whether a book was obscene (and thus suppressable) rather than the easy one, whether many people would be offended by it (and thus subject it to reasonable regulation but not suppression). What Lockhart and McClure call "the core problem"--what constitutes obscenity--has never been satisfactorily unraveled.**/

*/ Where the gist of the offense is more "sin" than "crime" see Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963).

**/ Lockhart & McClure, Obscenity Censorship: The Core Constitutional Issue--What is Obscene? 7 Utah L. Rev. 289 (1961).

Succeeding cases showed a marked tendency to confine the obscenity definition so as to narrow the class of books and magazines which could be suppressed by government power. In Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), the Court, reviewing the Post Office's seizure of a number of magazines which featured pictures of naked men, was asked to consider whether the "prurient interest" part of the Roth test referred to the prurient interest of the special audience at whom the magazines were targeted (homosexuals), or that of an average member of the community. Instead of answering that question, the Court asked another: observing that these pictures "could not be deemed so offensive on their face as to affront current community standards of decency," and assuming, arguendo, that pictures of naked men do arouse the prurient interest of certain parts of the population, could Congress have intended the incitement of prurience, simpliciter, to be a crime? Said Mr. Justice Harlan for the Court: ". . .one would not have to travel far even among the acknowledged masterpieces [in literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose. . . ." Since Manual Enterprises, the idea of "patent offensiveness" has always been a part of the definition of obscenity. In A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966), the Court was asked to consider the case of a book designed to appeal to a prurient interest in sex,

whose language patently exceeded the standards of candor existing in most communities, but which nevertheless possessed considerable artistic and literary merit. The plurality of the Supreme Court held that unless such a work was "utterly without redeeming social value," it could not be held obscene. Miller v. California, 413 U.S. 15 (1973) essentially restated and reiterated the main themes of obscenity doctrine as they have been unfolding since 1957. Its chief modification of what went before is to hold that the government need not prove material utterly bereft of redeeming social value, merely that it is without "serious literary, artistic, political or scientific value." */ 413 U.S. at 24.

Contemporaneous with the unfolding of obscenity doctrine, a different branch of first amendment doctrine developed, which held in narrow check the right of a citizen to insulate himself from the constitutionally protected speech of others. Mr. Justice Black, dissenting in Breard v. City of Alexandria, 341 U.S. 662 (1951), observed that "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate." How far that corollary of free speech extends has never been clear, and is not

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*/ Miller also answered a question long vexing to obscenity doctrine: the community standards to be applied in connection with the ascertainment of prurience were those of the local, not national, community. See 413 U.S. at 31-33. In connection with broadcasting, the relevant community has special significance. It is safe to assume that the standards of a national community would be applicable to a national broadcast, but we need not consider that issue here, in the context of a local FM radio station.

clear now. In Martin v. City of Struthers, 319 U.S. 141, an ordinance forbidding anyone from ringing a doorbell to deliver a handbill was struck down in the instance of a religious handbill. A city ordinance forbidding the use of sound trucks except to disseminate items of public concern was struck down in Saia v. New York 334 U.S. 558 (1948).*/ In Edwards v. South Carolina, 372 U.S. 229 (1963), the State's attempt to punish a number of noisy but peaceable demonstrators was held unlawful.**/ In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court threw out an anti-blockbusting injunction, saying: ". . .so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419. In Cohen v. California, 403 U.S. 15 (1971), a jacket bearing the legend "Fuck the Draft" was held protected speech.

Thus, one of the consequences of speech being protected by the First Amendment is that people do not have an unlimited right to avoid exposure to it. In this way, the trend in obscenity doctrine toward carving down the amount of material without the protection of the First

*/ Cf. Kovacs v. Cooper, 336 U.S. 77 (1949), where the Court upheld an ordinance that banned the use of sound trucks outright. In his concurring opinion, Justice Frankfurter opined that Kovacs and Saia were irreconcilable. But he was mistaken. Taken together, the two cases say that where sound trucks are allowed at all, their reasonable use as a medium of communication may be a constitutional right.

**/ Compare Adderly v. Florida, 385 U.S. 39 (1966).

Amendment, together with the limited insulation people are entitled to receive from protected speech, work together like scissors-blades on the sensibilities of a great many citizens.*/

II. Policy Considerations

As the Commission's opinion recognizes, this is essentially a case of first impression. Although Eastern Educational Radio (WUHY-FM), 24 FCC 2d 408 (1970) did rest squarely on a finding that certain

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*/ It is vital that it be recognized that the public use of certain words relating to sex and excretion are taboo, in the sense given to that term by Freud:

> "Taboo is a Polynesian word. . .[which] means uncanny, dangerous, forbidden and unclean. The opposite word for taboo is designated in Polynesian by the word noa and signifies something ordinary and generally accessible. Thus, something like the concept of reserve inheres in taboo; taboo expresses itself essentially in prohibitions and restrictions. Our combination of 'holy dred' would often express the meaning of taboo.
>
> "The taboo restrictions are often different from religious or moral prohibitions. They are not traced to the commandment of a god but really they themselves impose their own prohibitions; they are differentiated from moral prohibitions by failing to be included in a system which declares abstinences in general to be necessary and gives reasons for this necessity. The taboo prohibitions lack all justification and are of unknown origin."

S. Freud, Totem and Taboo, 31, 32 (A. Brill trans. 1918).

coarse language uttered in an interview was indecent under 18 USC 1464, circumstances have changed since that case was decided. In the first place, our definition of "indecent" in WUHY tracked the Roth-Memoirs definition of obscenity then in force; since that time, Miller v. California and its companion cases redefined obscenity; and obviously it is now necessary for us to consider whether and in what way the definition of indecency should also be changed. In the second place, the Court of Appeals in Illinois Citizens Broadcasting v. FCC, ___F.2d ___ (D.C. Cir. 1974) reserved the definition of "indecency" with a studied explicitness (Slip Op. at p. 10, n. 14) that commands the conclusion that the legal meaning of the term is still very much an open question. It is against this background that the Commission must act.

Although indecent broadcast material is clearly prohibited by 18 USC 1464, as the Commission recognizes, the Supreme Court's recent decision in United States v. Twelve 200-Foot Reels of Film, 413 U.S. 123, 130, n. 7 (1973) sheds doubt on whether the term indecent can be given a meaning independent of the meaning of "obscene." The Court there spoke to 19 USC 1305(a) and 18 USC 1462, which prohibits the interstate transportation of "indecent," "lewd," "lascivious," "filthy," or "immoral" materials. The Court held that if it were necessary to do so in order to avoid problems of unconstitutional vagueness and overbreadth, these terms would be limited to patently offensive representations or descriptions of specific "hard-core" sexual conduct of a type deemed to be obscene in the Miller decision. But 18 USC 1464, which deals with radio communications, is distinguishable from the provisions of the Code dealing with transportation which the Court construed in Twelve 200-Foot Reels.

Maybe it is a distinction without a difference but I think our duty requires us generally to assume the constitutionality of the statute if we can find a rational basis for doing so.

Broadcast communications are sufficiently different from other forms of communications to justify a degree of regulation not tolerable for other media. A number of possibly relevant differences can be identified: limitations on the radio spectrum which in general terms permit greater government scrutiny of the use to which the electronic media are put: */ the fact that these media enter the privacy of the home **/ are two prominent differences. I could not say that these differences compel, either as a matter of precedent or principle, a different standard of decency for broadcast than for other communications; however, I think that they may support moderately greater public demands from the former than from the latter.

*/ Compare Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) with Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). I am not sure that the condition of spectrum scarcity is pertinent here where the form of regulation is not directed at securing balance in speech or fuller expression of ideas. Perhaps an argument could be made that the condition of spectrum scarcity does compound the "Gresham's Law" phenomenon which the Commission relied on, in part, in Sonderling Broadcasting Corp., 27 R.R. 2d 285 (1973). But I would look on that argument with caution, for it could imply a more ambitious form of program "quality control" than is acceptable. See Red Lion, supra, 395 U.S. at 389. See generally, Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967).

**/ See Sonderling Broadcasting Corp., 27 R.R. 2d 285 (1973). It is not clear, however, which way this consideration cuts. The fact that the communication is received in private lessens the aspect of the offense that goes to public outrage; moreover, people have special rights to receive communications in their own homes even if these might be prohibited in any other context. See Stanley v. Georgia, 394 U.S. 557 (1969). At the same time, however, the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern.

Accordingly, I join the Commission's decision that we may proscribe "indecent" programming over the broadcast media--but absolutely crucial to my concurrence is the limited context in which this principle operates. Today's decision does carry us one step beyond Sonderling, which dealt with "obscene" material. But it is not, I think, a long step beyond. The concern there was similar to the basic concern here. Despite efforts to put the case for obscenity regulation on grounds of its direct influence on sexual (particularly sexually violent) behavior, a consideration which would be absent here, I do not think that the case for governmental intervention of a limited sort can be confined to that fear. The deeper concern about obscenity lies in apprehensions about its subtle, indirect and long-term effects on public attitudes and social mores. So it is with "indecency." While I would not have the government in the business of enforcing morals and good taste, whether in the name of preventing "indecency" or "obscenity," it seems to me legitimate that there be a limited regulation of offensive speech which is purveyed widely, publicly, and indiscriminately in such a manner that it cannot be avoided without significantly inconveniencing people or infringing on their right to choose what they will see and hear. In short, to adopt the Commission's language, I think we can regulate offensive speech to the extent it constitutes a public nuisance.

III. The Public Interest in Policing Decency

None of us supposes that invoking the nuisance concept is a talisman with which we can waive off all difficulties in approaching the task of controlling such speech. The reference to nuisance is meant to be more atmospheric than substantive. The governing idea is that "indecency" is not an inherent attribute of words themselves; it

is rather a matter of context and conduct.*/ Compare, Ginzburg v. United States, 383 U.S. 463 (1966).

I acknowledge that the logic of this "nuisance" test of obscenity or indecency could carry us much further into the realm of censorship than would be proper. But I also think that the attempt to accommodate the powerful sensibilities that attach to free speech on the one hand, and modesty on the other, is worth the effort. I do not think either interest deserves to be slighted. Yet, in the nature of things, it is easy to get carried away by the momentum of a single principle on either side of the dispute, and to fail to appreciate the validity of the impulses that are inconsistent with it. Some students of government regulation of decency have gone quite far in constructing a broad rationale for government intervention not merely as a means of curbing a "nuisance" in the narrow sense of that term, but more broadly as a means of maintaining some kind of general standard of quality in public manners. Irving Kristol, for example, has recently attempted to construct a case for "liberal censorship" along such lines:

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*/ I initially had some difficulty with the idea that "literary, artistic, political or scientific value" could constitute a defense to allegedly indecent language at one time of the day but not at another. I have concurred in this rule, however, because I understand it simply to carry forward an aspect of the "nuisance" idea--that is, that "indecent" is not a property of language, but arises when dirty words are uttered at inappropriate times or in inappropriate circumstances. Demonstrating that children are not unsupervised in the audience because of the late hour changes the context, and correlatively it changes the balance to be struck among the competing values, and whether particular language ought to be regarded as illegal or not.

On the issue of artistic value as a defense, one further point should be mentioned. Pacifica's comparison of Carlin with Mark Twain strikes me personally as being a bit jejuene. But no one should suppose that an author must be a giant of letters in order to receive protection for works which have "serious literary [or] artistic. . .value." The Constitution protects lesser literary lights as well as those with the artistic candlepower of Mark Twain. If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being "indecent" within the meaning of the statute.

> "[N]o society can be utterly indifferent to the ways its citizens publicly entertain themselves. Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering of animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles. And the question we face with regard to pornography and obscenity is whether. . .they can or will brutalize and debase our citizenry. We are, after all, not dealing with one passing incident--one book, or one play, or one movie. We are dealing with a general tendency that is suffusing our entire culture."

Kristol, The Case for Liberal Censorship, in Where Do You Draw the Line? 47 (1974). Kristol's argument for "liberal censorship" is similar to the provocative argument of James Fitzjames Stephen a century ago, and of Lord Devlin, in our own time, defending the role of the State in enforcing moral behavior. J. Stephen, Liberty, Equality, Fraternity (2d Ed. 1874); P. Devlin, The Enforcement of Morals (1968). This is hardly the occasion to examine the pros and cons of the Stephen-Devlin-Kristol thesis.*/ But it is the occasion to state that the legal enforcement of manners is an activity of government with a breathtakingly narrow scope in a free society.**/ And it is an activity that I could

*/ The classic case against the thesis is, of course, John Stuart Mill's, On Liberty (1859), the target of Stephen's (and to a lesser degree Devlin's) attack. For a concise but penetrating modern defense of Mill and a critique of Stephen's and Devlin's arguments, see H.L.A. Hart, Law, Liberty and Morality (1963).

**/ Which is not to deny that moral considerations may align with and provide some support for laws whose aim is utilitarian protection of individuals or society, a point well developed by Hart, supra.

not countenance this Commission engaging in. Neither the Communications Act nor 18 USC 1464 invests the FCC with a general power to establish canons of acceptable decency or good taste in programming. We cannot make the claim that Lord Mansfield made for his tribunal:

> "Whatever is contra bonos mores et decorum the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish."

Jones v. Randall (1774), quoted in Hart, supra, p.7. However the matter stood in 18th century England--or indeed 20th century England */ -- I trust no one doubts that things are different in the United States today.

Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young--or, more precisely, people's views about what sort of material it is proper to expose to the young--a purpose which even hard-

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*/ Mansfield's dictum has taken on new life as a result of the House of Lords' decision in Shaw v. Director of Public Prosecutions, 2 All Eng. Rep. 446 (1961). The opinion of Lord Simonds is particularly noteworthy in this respect:

> "When Lord Mansfield speaking long after the Star Chamber had been abolished said that the Court of King's Bench was the custos morum of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society."

bitten libertarians do not find entirely uncongenial.*/ Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material--or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

*/ Even Mill, second to none in advocating a limited role for government, granted it broader role in regard to minors--those not "in the maturity of their faculties." On Liberty, reprinted in Utilitarianism, Liberty and Representative Government, p.96 (Everyman ed. 1951). He also granted such a role to government in cases of "backward" societies, Ibid. I hope we do not qualify for that exception.

IV. Conclusion

On the premise advanced by Justice Holmes that "all rights tend to declare themselves absolute to their logical extreme," Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by tour de force. This agency, in my view, has the power to compel that co-existence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.